

2018 Underground Storage Tank Proposed Regulatory Amendments
401 KAR Chapter 42
Underground Storage Tank Branch
Division of Waste Management
March 2018

This document is not intended to provide a legal analysis or interpretation of the draft amendments and does not cover every detail of the draft amendments, and it is incumbent upon you to read the draft regulations and the outlines as part of your review for the development of comments. As you read through the draft regulations and manuals, keeping the general provisions in this overview in mind will hopefully aid your understanding of the direction taken.

The purpose of this document is to provide the following information.

- I. Overview of the Proposed 2018 Regulatory Amendments to 401 KAR Chapter 42 (Pages 1-7)
- II. Procedure for Providing Comments (Page 8)
- III. Tentative Timeline (Page 9)

I. Overview of the Proposed 2018 Regulatory Amendments to 401 KAR Chapter 42

Regulatory amendments to 401 KAR Chapter 42 are necessary to implement and enforce the 2015 Federal Regulation. The Underground Storage Tank (UST) Branch proposed regulations combine several of the twenty-one (21) current regulations in a manner that will eliminate redundancy and streamline the overall regulation package. There will only be five (5) regulations that will deal specifically with regulated USTs. The hearings section in 42:320 was removed as it is established in accordance with KRS 224.10-420.

2018 Proposed Amendments		2011 Regulations
401 KAR 42:005	Definitions	42:005
401 KAR 42:020	UST System Requirements, Notification, Registration, and Annual Fees	42:011 42:020 42:030 42:040 42:045 42:070 (<i>temporary closure</i>) 42:090 42:095 42:200
401 KAR 42:060	UST System Release and Corrective Action Requirements	42:050 42:060 42:070 (<i>permanent closure</i>) 42:080
401 KAR 42:250	Petroleum Storage Tank Environmental Assurance Fund Reimbursement	42:250 42:290 42:300 42:316 42:320 (<i>reconsideration</i>) 42:335 42:340
401 KAR 42:330	Small Owners Tank Removal Account	42:330

401 KAR 42:005 – Definitions

Proposed amendments to definitions provide clarity as well as remove redundancy of terms defined in the federal regulations. Definitions amended or added to the regulation include:

- **"Analytical testing"** was added for clarification.
- **"Corrective action"** was amended for clarification.
- **"Double walled"** was added for clarification.
- **"Entry level"** was amended to exclude initial response actions and optional soil removal at the time of permanent closure.
- **"Field blank"** was added as a field blank will be required with BTEX water sampling.
- **"Interstitial space"** was amended to include any component of a UST system to incorporate sumps, UDCs, and spill buckets.
- **"Professional engineer"** and **"professional geologist"** were added for clarification.
- **"Release"** was clarified for hazardous substance tanks and includes an exclusion for permitted or authorized releases.
- **"Unusual operating condition"** was amended to include an abnormal condition, an unexplained presence of product in containment devices, and any failing test results.

401 KAR 42:020 – Registration and Operational Compliance

Nine (9) regulations have been combined into the proposed 401 KAR 42:020 regulation. The combination of these regulations will eliminate searching nine (9) different regulations for the ownership and operation of USTs. The primary requirements for the registration of USTs have not changed, however some changes to the type of tanks that are regulated and some amendments to the forms are proposed. Operational compliance amendments are being included to meet the requirements of the 2015 federal regulation that includes the 2005 Energy Policy Act requirements. Temporary closed tank requirements were included in this regulation.

Proposed Amendments:

- Previously excluded field-constructed tanks and airport hydrant fuel distribution systems are no longer excluded and will be required to register and follow the requirements of 401 KAR Chapter 42.
- Removed the deferral for generator tanks from release detection. All generator tanks used for the generation of power will be required to meet all of the requirements in 401 KAR Chapter 42.
- Included an exclusion for tanks used in the operation of heating equipment, boilers, and furnaces, but with a secondary usage as part of an emergency generator system as stated in the federal regulation, if:
 - Contents consumed on the premises where stored; and
 - Tank stores fuel oil number 1, 2, 4, 5, 6, or residual fuel oil.
- Temporary closure requirements are amended to include that a UST system in temporary closure that is "empty", does not have to perform walkthrough inspections.
- Double walled piping shall be installed when 50% or more of piping is removed or replaced instead of the 100% as required by the 2011 regulation.
- All testing shall be by a method approved by the device's manufacturer, code of practice developed by a nationally recognized association or an independent testing laboratory (e.g., spill containment devices, overfill prevention equipment, UDCs, and release detection equipment).
- Allow monthly monitoring for double walled spill containment devices (spill buckets), UDCs, and sumps in lieu of the thirty-six (36) month testing requirement.

- All spill buckets not currently subject to testing requirements in the 2011 Regulation must test by October 13, 2018 and then every thirty-six (36) months thereafter.
- Testing for overfill prevention devices shall be conducted by October 13, 2018 and then every thirty-six (36) months thereafter.
- All ball float valves will be required to be replaced or physically removed and examined to verify the ball and cage are intact and functioning properly. If this overfill prevention equipment is not functioning properly, the ball float cannot be replaced with another ball float. If the ball float cannot be evaluated, an automatic shut-off device or high-level alarm, set to activate at ninety (90) percent capacity, shall be installed.
- Added testing requirements and deadlines after a UST system repair. The testing is required for the piping, tank, or component that was repaired.
- Release detection records shall be maintained for three (3) years for an annual operational test and until the next test is conducted for tank and line tightness testing.
- Added walkthrough inspection requirements. Monthly walkthroughs are every thirty (30) days and annual walkthroughs are every twelve (12) months.
- Amended the current regulation to require the new owner to maintain a copy of a properly executed deed or other properly executed legal document supporting the transfer of the UST system and submit to the cabinet if requested.
- Removed the Certificate of Registration and Reimbursement Eligibility (CORRE) from regulation.
- Removed the requirement for registration forms to be notarized.
- Allow an option for an integrity assessment if a tank has been unprotected for corrosion for more than 365 days. If the steel thickness is less than 75% of the original thickness, the tank shall be permanently closed.
- Simplified the operator training requirements by adopting the federal language (40 C.F.R. 280 Subpart J). Training required for a Class A operator and Class B operator will be combined as one (1) combined Class A operator and Class B operator training in lieu of the Kentucky's current reference to a designated compliance manager (DCM). Kentucky will be able to accept third-party training for trained operators as long as it meets the federal requirements.
- The UST System Installation and Maintenance Outline will be referred to as a manual. The manual has also been expanded to include registration and further detail installation and operational compliance.
- Existing forms have been amended and several new forms are incorporated into 401 KAR 42:020. New forms include:
 - UST Annual Walkthrough Inspection (DWM 4220) is required to document the federally mandated annual walkthrough inspection.
 - UST Monthly Walkthrough Inspection (DWM 4230) is required to document the federally mandated monthly walkthrough inspection.
 - UST Overfill Prevention Device Test (DWM 4232) is required to document and verify proper testing for overfill prevention devices.

401 KAR 42:060 – Release Confirmation, Assessment and Corrective Action

The proposed regulation combines four (4) current regulations into one regulation, and six (6) outlines into one (1) outline incorporated by reference. The primary requirements for the release reporting, initial abatement, site check, site investigation, corrective action, closure, and classification have not changed from our current requirements, however some changes to the forms are proposed. The temporary closure requirements that were previously in 401 KAR 42:060 have been incorporated in the proposed 401 KAR 42:020 regulation.

Proposed Amendments:

- New federal language for reporting requirements of a release or a suspected release have been included. The additional wording allows an owner or operator with an upgraded tank system to have a release without reporting it, if

the release is contained, the faulty component is repaired, and any liquid found in a secondarily contained system, not used for interstitial monitoring, is immediately removed.

- Amended wording to clarify the Emergency Response Team (ERT) has the authority to prevent delivery, deposit, or storage of a regulated substance, as well as "dispensing", during a declared emergency.
- Clarified a UST system "for which dispensing had ceased" is eligible for the pre-April 18, 1994 regulations (Backlog). This will continue to allow tank systems that stopped dispensing to be eligible for the pre-April 18, 1994 regulation requirements.
- All UST facilities will be required, if necessary, to classify under the new regulations, with the exception of those facilities that submitted a Notice of Intent or reported a release prior to April 18, 1994.
- Require releases from UST systems containing biodiesel to contact the UST Branch to determine the type and extent of the investigation after a release.
- The six (6) outlines incorporated by reference in the 2011 regulation, are being proposed as one (1) combined manual that is more user friendly and reduces duplicative information. The proposed UST Corrective Action Manual establishes procedures for corrective action which includes release response and reporting, initial abatement, site check, permanent closure and change in service, site investigation, corrective action, and facility classification. Specific proposed amendments to the manual include:
 - Permanent Closure
 - Standards for closure in place have been incorporated in the manual. Reporting requirements include an invoice of the inert solid material purchased to verify the amount of material backfilled into the tank and photographic documentation of the tank being filled to capacity.
 - Expanded the requirements for when water is encountered in the excavation during closure by removal from the ground.
 - Closure Assessment Report requirements have been amended to include a site history, in addition to detailed conclusions and recommendations.
 - Site Investigation
 - Additional reporting requirements include a chronology, site and area description, geologic cross sections, and a karst evaluation (if applicable). Trends in groundwater flow, in addition to concentration and groundwater elevation trend analysis are also required.
 - Additional maps required include an aerial photographic map and a bedrock contour map (if applicable).
 - Monitoring well installation, construction, modification, repair, and abandonment requirements have been detailed.
 - Soil and groundwater sampling have been clarified to ensure proper sample collection, handling, and preservation of environmental samples.
 - Field blanks will be required with all BTEX water sampling along with trip blanks.
 - Vapor sampling and reporting have been incorporated into site investigation.
 - Comprehensive conclusions and recommendations will be required with each Site Investigation Report.
 - Information regarding surface material replacement and monitoring well abandonment will be required, in order to allow for the issuance of a written directive and a reimbursable amount for facility restoration within a no further action letter.
- Existing forms have been amended and one (1) new form is incorporated into 401 KAR 42:060.
 - UST Interim Corrective Action Checklist (DWM 4265) is a new form that will be required to be submitted with an Interim Corrective Action Report as directed by the cabinet.
 - UST Groundwater Monitoring Checklist (DWM 4264) will replace the Corrective Action Monitoring Report (DEP 5040).

401 KAR 42:250 – PSTEAF Reimbursement

The proposed regulation combines seven (7) current regulations into one (1) regulation. The proposed regulation includes reimbursement procedures, the ranking system, third-party claims, eligibility requirements for eligible companies or partnerships, financial audits, reconsiderations and laboratory certification. Amendments to the regulatory provisions for PSTEAF reimbursement are intended to simplify the process while providing clarification of the requirements.

- State-owned facilities will be eligible to apply for PSTEAF reimbursement.
- Clarified that initial response actions performed prior to a written directive are limited to \$1,000. This does not apply to sites that have a declared an environmental emergency by the cabinet.
- Clarified that an eligible company or partnership, contracted by an applicant, shall not require payment from the applicant in an amount greater than the reimbursable amount.
- Account Placement amendments
 - Removed the Certificate of Registration and Reimbursement Eligibility (CORRE) requirement from 401 KAR 42:020, and therefore it has also been removed from the eligibility for placement in the Financial Responsibility Account (FRA). However, a complete and accurate Facility Registration will remain a requirement for eligibility.
 - Allow any petroleum regulated UST to be eligible for the Petroleum Storage Tank Account (PSTA) if they cannot meet the requirements of the Financial Responsibility Account (FRA), as long as the USTs are registered with the UST Branch.
- Amended the entry level requirement (deductible for reimbursement) for:
 - Initial response actions (\$1,000) prior to a written directive to encourage owners to begin initial response actions prior to a written directive.
 - Optional over-excavation (OE) during permanent closure to encourage corrective action as soon as possible.
 - Disposal of contaminated soil and groundwater during permanent closure.
- Establishing the reimbursable amount for a written directive by:
 - Allowing for an adjustment to a reimbursable amount for work in a written directive that could not be completed due to reasons beyond the control of the applicant, or the eligible company or partnership.
 - Clarifying that the UST Branch shall have final authority to determine all reimbursable actions including site characterization and corrective action technologies.
 - Allowing for the cost of the surface material to be limited to the cost to replace the material damaged, not the actual area damaged.
 - Requiring facility restorations to be directed by the UST Branch and a fixed cost will be assigned prior to the work being performed.
- Eligible and ineligible costs have been amended to group eligible and ineligible costs allowing for a better understanding of cost.
 - Clarified when eligible companies and partnerships will receive a 15% markup for subcontractors and materials.
 - Added that costs incurred prior to a written directive are ineligible for reimbursement.
 - Limited mobilization for an eligible company to 1,000 miles round trip.
 - Ineligible costs were amended to include:
 - Laboratory costs if a certified laboratory fails to maintain eligibility.
 - Costs incurred due to a significant delay in implementation of corrective action.
 - Any costs incurred after an eligible company fails to maintain eligibility.
- Removed the requirement for a P.E. or a P.G. to sign the claim form.
- Clarified that all written directives will be issued in accordance with the ranking system if PSTEAF reimbursements are suspended.

- Eligible company and partnership requirements were amended to require:
 - To be active and in good standing with the Secretary of State for eligible company and partnership application approvals.
 - The cabinet be notified, by the insurance company, when there is a lapse of insurance coverage.
 - Maintaining eligibility requirements or receive revocation for failure to maintain eligibility requirements.
- Laboratory certification requirements were amended to:
 - Allow for reimbursement for field instrumentation results that are not analyzed by a certified laboratory.
 - Require laboratories to be capable of analyzing for all of the constituents listed in the Analytical Requirements for Soil and Groundwater tables (Table 7 and 8 in the UST Corrective Action Manual).
- The ranking system was redeveloped to simplify the overall ranking process. Payment for sites to applicants seeking reimbursement is proposed to be based on two (2) environmental ranks and two (2) financial categories.
- Allow for a request for an extension to a deadline established by the cabinet, except for third-party claims and reconsiderations.
- The UST PSTEAF Reimbursement Rates (formerly the UST Contractor Cost Outline) was amended to include additional formulated task rates for tasks not previously included as well as costs related to permanent closure associated with the Small Owners Tank Removal Account (SOTRA). Several reporting costs have been amended to include additional reporting required by the UST Corrective Action Manual.
- Existing forms have been amended and two (2) have been eliminated.
 - Payment Verification Affidavit (DEP 6075) was incorporated on the claim forms.
 - Cost Estimate Form (DEP 6090) was no longer necessary.

401 KAR 42:330 – Small Owner Tank Removal Account (SOTRA) Reimbursement

Amendments to the regulatory provisions for SOTRA reimbursement are intended to simplify the process while providing clarification for the process requirements.

- SOTRA eligibility requirements have been amended to:
 - Allow facilities associated with tanks that have dispensed motor fuel to be eligible for SOTRA by removing "retail sale or wholesale distribution of motor fuel" from the regulation.
 - Clarify that the current notice of intent (NOI) to permanently close form is sufficient to provide the cabinet of written notice for a tank closure.
- State-owned facilities are eligible to apply for SOTRA reimbursement.
- Allow a facility one (1) year from the application approval date to perform permanent closure under the Small Owner Tank Removal Account (SOTRA) program as the application will expire after one (1) year. The applicant may reapply after expiration, if necessary.
- Application procedures have been amended.
 - Financial records may be submitted in lieu of tax returns for an applicant that has not been required to file federal income tax returns.
 - Removed the requirement that the owner retain a copy of the application for their records.
 - Removed the availability of funding status in the application approval letter. If there are not funds to approve the application, an application denial letter will be issued stating the denial is due to insufficient funding.
 - All work under SOTRA will be directed in writing which will include the establishment of the reimbursable amount.
- Costs for permanent closure and facility restoration was removed from regulation and has been incorporated in the UST PSTEAF Reimbursement Rates, incorporated by reference in 401 KAR 42:250.

- Claim amendments include the:
 - Removal of the requirement that the owner retain a copy of the claim for their records.
 - A requirement to submit invoices and weigh tickets with the claim for directed actions in lieu of the SOTRA worksheet.
- All work will be directed in writing and will include a worksheet for the reimbursable amount. An owner will receive reimbursement for actions performed once the report is deemed technically complete. This is the current process for all other written directives and the same process has been incorporated for SOTRA.
- The application form has been renamed and two (2) existing forms have been eliminated.
 - UST Application for Assistance for SOTRA (DWM 4294) will replace the SOTRA Application for Assistance (DEP 6067).
 - SOTRA activities will be directing in writing with the reimbursable amount, therefore it is no longer necessary for these forms.
 - SOTRA Claim Request (DEP 6068)
 - SOTRA Reimbursement Worksheet (DEP 0064)

II. Procedure for Providing Comments

Please use the following format in compiling your comments:

- 1) General Comments
- 2) Specific Comments with Recommended Changes
- 3) Backup Documentation to Support Recommended Changes to the Contractor Cost Outline (i.e., invoices, cost breakdowns, quotes, etc.)

It is suggested that, while reviewing the UST PSTeAF Reimbursement Rates, consider the total costs reimbursed as opposed to specific "line item" costs.

Email compiled comments as described above to the UST Branch by April 13, 2018 to:

Dawn Baase, Environmental Scientist under the Branch Manager of the UST Branch at Dawn.Baase@ky.gov.

III. Tentative Timeline

Please keep in mind that these dates are merely projections, as the scheduling of legislative meetings is under the control of the Legislative Research Commission (LRC) and Legislature.

Date	Activity
April 13	Comments submitted to the UST Branch (Dawn Baase)
April 13 – May 4	Review of comments by the UST Branch
June – July	Internal approvals (Cabinet and Governor's Office)
July 13	Formally file the regulations with LRC
August 1	Regulation published in the Kentucky Administrative Register
July 13 – August 31	Public comment period
Late August	Public hearing
October 15	Statement of Consideration (Response to Comments) filed
December 5	Hearing with the Administrative Regulation Review Subcommittee of the Legislature
December 6 – January 4	Regulation referred to Interim Joint Committee on Natural Resources and Environment by LRC
January 4, 2019	Hearing with Interim Joint Committee on Natural Resources and Environment for final Legislative review; if approved, regulations are effective at the close of that meeting

The UST Branch appreciates you taking the time to review and comment on this draft regulation package. Should there be any changes in the schedule, you will be notified as soon as possible.

Thank you for your willingness to participate in this important effort. If you have any questions or need additional information, please contact Dawn Baase, Environmental Scientist under the Branch Manager of the UST Branch at 502-782-6311 or Dawn.Baase@ky.gov.